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**COMMISSION REPORT  
TO THE EUROPEAN COUNCIL**

**BETTER LAWMAKING 2002**

**10th REPORT**

pursuant to Article 9 of the Protocol  
on the application of the principles of subsidiarity and proportionality.

# COMMISSION REPORT TO THE EUROPEAN COUNCIL

## BETTER LAWMAKING 2002

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## 1. INTRODUCTION

For the tenth consecutive year, the Commission is presenting to the European Council and the European Parliament the report on the application of the principles of subsidiarity and proportionality, as defined in **Article 5 of the EC Treaty**.

The report originated at the request of the Edinburgh European Council of December 1992<sup>1</sup>. That request was subsequently incorporated into the interinstitutional agreement on procedures for implementing the principle of subsidiarity of 1993<sup>2</sup>, then finally into the **Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam in 1997**.

Every year since the first report in 1993, the Commission has presented a report to the European Council and the European Parliament on the application of the principles of subsidiarity and proportionality<sup>3</sup>. Observation of these principles has guided the Commission in exercising its right of initiative throughout this period.

It has been a decade in which the principles of subsidiarity and proportionality have also been at the heart of institutional debate, both at Community level and in the Member States. Important work relating to these principles is still going on within the **Convention on the future of the Union**.

The report on "Better lawmaking" has itself undergone some changes during this period, with the incorporation from 1995 onwards of the presentation of achievements made in the field of legislative quality, the Institutions realising that application of the principles of subsidiarity and proportionality is in fact closely linked to the quality of legislation itself. Since then, the Commission has been constantly making proposals in this area, such as the White Paper on European Governance and the Action Plan to simplify and improve the regulatory environment, adopted in July 2001 and June 2002<sup>4</sup>.

As in the previous reports, the report "**Better lawmaking 2002**" first of all gives an account of how the principles of subsidiarity and proportionality have been applied by the Commission this year, as well as the measures it has taken to improve the quality and accessibility of legislation (consultation, codification, recasting, consolidation, simplification and drafting quality).

The tenth report, which presents a rough assessment of the period, also focuses on two new factors of a more political nature.

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<sup>1</sup> Conclusions of the Edinburgh European Council of 11 and 12 December 1992, pages 3 and 4.

<sup>2</sup> Interinstitutional agreement between the European Parliament, the Council and the Commission of 29 October 1993; Bull. 3/EC 10-1993, p. 129.

<sup>3</sup> COM(1993)545 final of 24 November 1993; COM(1994)533 final of 25 November 1994; COM(1995)580 final of 20 November 1995; ESC(1996)7 final of 27 November 1996; COM(1997)626 final of 26 November 1997; COM(1998)715 final of 1 December 1998; COM(1999)562 final of 3 November 1999; COM(2000)772 final of 30 November 2000; COM(2001)728 final of 7 December 2001.

<sup>4</sup> COM(2001)428 final of 25 July 2001; COM(2002)278 final of 5 June 2002.

- Firstly, in line with the commitment set out in the White Paper on European Governance, the **Commission has focused the report on "the main objectives of European Union policies"**<sup>5</sup>, and no longer on a few fields of activity chosen at random.
- In addition, the **Commission wishes to place application of the principles of subsidiarity and proportionality in its original interinstitutional context**<sup>6</sup>. By adopting this approach, which is more in keeping with the spirit of the Treaty and the Protocol, the Commission wishes to emphasise that the principles of subsidiarity and proportionality remain dynamic concepts and that their **effective application depends on the joint responsibility of the Parliament, the Council and the Commission**, and on effective operation and dialogue within the institutional triangle.

## 2. HOW THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY ARE APPLIED

### 2.1. The legal and institutional framework

#### a) Article 5 of the EC Treaty and the Protocol to the Treaty of Amsterdam

Article 5 of the EC Treaty, introduced by the Treaty of Maastricht, lays down **three conditions for the application of the principle of subsidiarity**. This principle is applied:

- within the context of the powers and objectives conferred upon the Community by the Treaty, but does not concern the Community's *exclusive powers*;
- in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. This therefore involves establishing the *potential insufficiency of action by the Member States*;
- if Community action is preferable by reason of the scale or effects of the proposed action. Community action must therefore bring *an added value* in terms of effectiveness.

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<sup>5</sup> "The annual report on the implementation of the Amsterdam Protocol on Subsidiarity and Proportionality will be oriented towards the main objectives of European Union policies. It will investigate the extent to which the Union has applied the proportionality and subsidiarity principles in pursuing its main goals", in the White Paper on European Governance, adopted on 25 July 2001.

<sup>6</sup> In the previous reports, the Commission concentrated mainly on examining how it had implemented the principles of subsidiarity and proportionality, except in the report "Better lawmaking 1998 – a shared responsibility" in which it highlighted the responsibility of the Parliament, the Council and the Member States (COM(1998)715).

In order to assist the Institutions when examining the last two conditions, the Protocol annexed to the Treaty of Amsterdam lays down the following **guidelines**<sup>7</sup>: Community action is justified where transnational issues are involved, where action by a Member State alone or lack of Community action would conflict with the requirements of the Treaty; or where action at Community level would produce clear benefits by reason of its scale or effects.

The Protocol does not lay down rigid criteria, but also emphasises that: "*The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a **dynamic concept** and should be applied in the light of the objectives set out in the Treaty*"<sup>8</sup>.

With regard to the **principle of proportionality**, the Treaty and the Protocol give a common definition: "*Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty*" and "*the Community shall legislate only to the extent necessary*"<sup>9</sup>. The Protocol also provides guidelines concerning the choice of legislative instrument and the force of its contents: the form of Community action must be as simple as satisfactory achievement of the objective permits; "*other things being equal, directives should be preferred to regulations and framework directives to detailed measures*"<sup>10</sup>; it is necessary to take into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, "*to be minimised and proportionate to the objective to be achieved*"<sup>11</sup>.

## **b) The obligations of the Institutions**

The principles of subsidiarity and proportionality having been defined for Community action, the European Parliament, the Council and the Commission are under a legal and political obligation to ensure that they are complied with: "*In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality (...)*"<sup>12</sup>.

In addition, each Institution is responsible for ensuring compliance and monitoring *in the context of the normal Community process, in accordance with the rules laid down in the Treaty*<sup>13</sup>.

Also with regard to **common obligations**, the interinstitutional agreement on the principle of subsidiarity and the Protocol also make provision for **specific obligations** for each of the Institutions (cf. infra points 2.2 and 2.3).

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<sup>7</sup> Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality.

<sup>8</sup> Article 3 of the Protocol.

<sup>9</sup> Article 6 of the Protocol.

<sup>10</sup> *Idem.*

<sup>11</sup> Article 9 of the Protocol.

<sup>12</sup> Article 1 of the Protocol.

<sup>13</sup> Interinstitutional agreement between the European Parliament, the Council and the Commission of 29 October 1993; Bull. 3/EC 10-1993, p. 129.

All these conditions, guidelines and obligations create a consistent legal framework within which to apply the principles of subsidiarity and proportionality. However, as stressed in the Protocol, the application of the principles by the Institutions must remain a dynamic concept within this legal framework.

## 2.2. Application of the principles by the Commission in 2002

When drawing up a proposal for a legislative act, the Commission, in addition to taking into account the three conditions laid down in Article 5 of the EC Treaty, must also respect the specific obligations provided for in the Protocol. It must **consult** widely before proposing legislation; **justify in the explanatory memorandum** the relevance of its proposals with regard to the principle of subsidiarity; explain the financing of Community action; ensure that the financial burden on the Community, Member States, local authorities, economic operators and citizens be minimised<sup>14</sup>. The Commission must also ensure that the reasons for concluding that a Community objective can be better achieved by the Community are "*substantiated by qualitative or, wherever possible, quantitative indicators*"<sup>15</sup>. Finally, it must submit an annual report to the European Council and the European Parliament on the application of Article 5 of the EC Treaty. The report will also be sent to the Economic and Social Council and the Committee of the Regions<sup>16</sup>.

As it is impossible within the scope of this report alone to examine all the Commission's proposals in the light of these conditions and obligations, the Commission decided, in accordance with the commitment made in the White Paper on European Governance, to focus this report on *the European Union's main policy objectives*, in order to demonstrate the relevance of its choices and the quality of the proposals made in these areas.

The Commission's Work Programme for 2002<sup>17</sup> highlights several policy priorities, of which only **security, sustainable development and development cooperation** are relevant for examining the legislative initiatives undertaken in 2002 in relation to the application of the principles of subsidiarity and proportionality<sup>18</sup>.

### a) Immigration, criminality and security at external borders

The increase in illegal immigration, particularly in the form of networks of smugglers trafficking in human beings, has been a source of concern to the Member States and their citizens for several years. Faced with this situation, the Member States' response seems neither appropriate nor sufficient, since only certain Member States have such measures, and these differ from one Member State to the next.

The Commission has therefore been examining whether or not to make a **proposal for a Council Directive on a short-term residence permit**, under the terms of Article

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<sup>14</sup> Article 9 of the Protocol.

<sup>15</sup> Article 4 of the Protocol.

<sup>16</sup> Article 9 of the Protocol.

<sup>17</sup> COM(2001)620 final adopted on 5 December 2001.

<sup>18</sup> The same does not apply to the other priorities concerning the Mediterranean, European Governance, the euro and enlargement.

63(1) of the EC Treaty, in order to step up the fight against persons committing such offences and to protect their victims<sup>19</sup>.

A questionnaire sent to the Member States in 2000 and consultations held in the European crime prevention forum of 30 October 2001 convinced the Commission that it should propose measures in this field. As stated in the explanatory memorandum to the Commission's final proposal<sup>20</sup>, the inadequacy of Member States' action against this predominantly transnational problem, and the need to adopt common rules to avoid competition for entry at the borders, justify the Commission's proposal with regard to the principles of subsidiarity and proportionality. The proposal for a directive therefore provides for the adoption of harmonised rules to introduce a residence permit for victims of illegal immigration who cooperate with the competent authorities.

The proposal also respects the principle of proportionality. It therefore sets out common definitions and confines itself to defining the criteria for issuing the short-term residence permit, laying down the terms of residence granted to the holders and the grounds for non-renewal or withdrawal, leaving Member States free to enact more favourable conditions. Consequently, the directive has been chosen as the appropriate instrument for laying down these measures.

The control of external borders is a complementary, priority measure in a Union preparing for enlargement. In this context, and given that the *acquis communautaire* as regards the crossing of external borders still lacks proper operational coordination, the Commission considers it necessary for the Community to be able to propose working and cooperation mechanisms at European Union level.

The Commission wished to consult widely on the subject before making a proposal, also in view of the fact that it is a new area of responsibility. This was the reason behind the **communication "Towards integrated management of the external borders of the Member States of the European Union"**<sup>21</sup>. This is a discussion paper on whether or not to legislate at Community level. Action at European Union level does in fact seem the most appropriate means of ensuring uniform management of external borders which protect the Community, since Member States have removed internal border controls. Depending on the outcome of this consultation, the Commission will decide whether or not to make a legislative proposal, and if it decides in favour, will determine the procedures involved.

## **b) Safety of transport**

Following the attacks which occurred on 11 September 2001 in the United States, there was felt to be a need to further reinforce the safety of citizens, particularly in the field of air transport. The Commission has identified a major risk in this area

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<sup>19</sup> The Commission made several other proposals in this field in 2002: proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service (COM/2002/548) adopted on 7 October 2002; proposal for a Council framework decision on attacks against information systems COM(2002)173 final adopted on 19 April 2002.

<sup>20</sup> COM(2002)71 final adopted on 11 February 2002.

<sup>21</sup> COM(2002)233 final adopted on 7 May 2002.



associated with deficiencies in Member States' procedures with regard to carriers from third countries. Not all the Member States actually subject them to the same checks, creating a risk to the safety of passengers and a distortion of competition, with certain carriers being able to decide to use certain airports rather than others because of less stringent regulations. After receiving the opinion of the High Level Group of aviation safety experts, therefore, the Commission proposed a European Parliament and Council **Directive on the safety of third countries' aircraft using Community airports**<sup>22</sup> in order that on the ground inspections, in particular, be carried out by some Member States on non-Community aircraft be extended to the whole of the Community.

In order to achieve the proposal's objective most effectively, the Commission had to define the appropriate legislative instrument in the light of the recommendations made in the Protocol<sup>23</sup>. The Commission proposal sets out general objectives and procedures to guarantee harmonisation, but leaves the responsibility for transposing monitoring principles and structures, based on detailed common standards, up to the Member States. The choice of framework-directive was therefore ruled out in favour of a directive<sup>24</sup> and in the explanatory memorandum, the Commission explains why it is impossible to use a framework-directive.

### c) **Sustainable development and development cooperation**

Sustainable development is a concept which cuts across several areas, including the environment. The proposal for a European Parliament and Council Directive on **environmental liability**<sup>25</sup> applies the principle that the polluter should pay, in accordance with Article 174(2) of the EC Treaty. This proposal establishes a framework for the prevention and remedying of environmental damage. It was felt necessary to take action at Community level because of the existence of contaminated sites, water pollution and damage to biodiversity, and because not all the Member States have set up a liability system for environmental damage. The aim is to ensure that in the future those who contaminate clean up the damage or bear the costs. Failure to apply the polluter pays principle may perpetuate the reprehensible patterns of behaviour that resulted in the present stock of contaminated sites. Furthermore, in the absence of a common legislative framework, economic operators could exploit the differences between the Member States to escape liability. The legislative proposal serves this purpose but it is proportionate to requirements because it establishes a framework of measures aimed at remedying substantial damage affecting biodiversity as a minimum common basis which Member States may use as a reference in order to implement the proposed regime effectively.

The concept of sustainable development is also included in the Commission's legislative initiatives in the field of transport and energy, in particular in the "**oil and**

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<sup>22</sup> COM(2002)8 final, adopted on 14 January 2002, page 4.

<sup>23</sup> Article 6 of the Protocol.

<sup>24</sup> COM(2002)8 final, page 5.

<sup>25</sup> Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage; COM(2002)17 final adopted on 23 January 2002.

**gas stocks" package**<sup>26</sup>, the main aim of which is to safeguard the security of energy supply. The Commission decided to make legislative proposals in this field for several reasons: inadequate harmonisation and coordination of national legislation at Community level may lead to distortions on the internal market for petroleum products; in addition, it is necessary to accompany the opening up of the internal market for energy with measures which will guarantee the security of supplies and, finally, to define a new framework for energy programmes associated with a European strategy for sustainable development.

Community action was felt to be necessary, given that the issues raised clearly have transnational aspects and action taken by the Member States seems insufficient on the basis of the present lack of coordination. Within the "oil and gas stocks package", the two proposals for a Directive concerning measures to safeguard security of energy supply meet this requirement and define a new Community framework. It will be necessary among other things to monitor trends on international oil and gas markets and assess their impact on the security and safety of supplies, and to monitor the level of security stocks. This framework of Community rules, however, makes the Member States responsible for establishing certain implementing rules. The choice of directive as the legislative instrument is thus flexible and effective because it lays down a minimum of rules to be applied by the Member States.

The Commission also relied on its policy priority in the field of sustainable development to back up its proposal for a **mid-term review of the Common Agricultural Policy**<sup>27</sup>. It is interesting to note that within this policy the Commission has taken into account innovative aspects which are in the domain of shared responsibilities (mainly environment, rural development). The Commission relied for certain aspects of the text on quantitative elements and financial and budgetary impact assessments of its proposals, as required by the Protocol annexed to the Treaty of Amsterdam, and annexed these to the proposal<sup>28</sup>.

Another example, the proposal for a Directive of the European Parliament and of the Council on **temporary workers**<sup>29</sup>, aims, among other things, to provide a framework for this type of employment which is increasing sharply within the Union and has

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<sup>26</sup> Communication from the Commission to the European Parliament and the Council: The internal market in energy: Co-ordinated measures on the security of energy supply; proposal for a Directive of the European Parliament and on the Council concerning the alignment of measures with regard to security of supply for petroleum products; proposal for a Directive of the European Parliament and the Council concerning measures to safeguard security of natural gas supply; proposal for a Council Directive repealing Council Directives 68/414/EEC and 98/93/EC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, and also Council Directive 73/238/EEC on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products; proposal for a Council Decision repealing Council Decision 68/416/EEC on the conclusion and implementation of individual agreements between governments relating to the obligation of Member States to maintain minimum stocks of crude oil and/or petroleum products and Council Decision 77/706/EEC on the setting of a Community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil and petroleum products; COM(2002)488 final adopted on 11 September 2002.

<sup>27</sup> COM(2002)394 final adopted on 10 July 2002.

<sup>28</sup> The evaluations concerning this proposal are available via:  
[http://europa.eu.int/comm/agriculture/eval/index\\_fr.htm](http://europa.eu.int/comm/agriculture/eval/index_fr.htm).

<sup>29</sup> COM(2002)149 final adopted on 20 March 2002, page 26.

truly transnational aspects. Some temporary employment agencies or user undertakings operating in several countries make use of temporary workers. Not only do national legislations differ from one country to another, but only nine Member States have measures in this field. This situation is therefore likely to penalise temporary workers and to restrict the development of this practice, which is, however, necessary to maintain a dynamic European economy.

The proposal for a Directive thus lays down a common framework aiming at improving the quality of work of temporary workers, in particular with regard to the principle of non-discrimination between temporary workers and comparable workers of user undertakings. When preparing the legislation, the Commission initially asked the social partners to negotiate this agreement (between June 2000 and May 2001), pursuant to Articles 138 and 139 from the EC Treaty. As this negotiation was unsuccessful, the Commission put forward a proposal for a Directive incorporating the items on which the partners had reached agreement. The Commission also carried out a detailed qualitative assessment of the impact<sup>30</sup> of this proposal on enterprises, i.e. the implications of the Directive on employment, investment and the competitive position of business. That assessment is annexed to the proposal for a Directive.

The proposal also complies with the principle of proportionality, since it sets out a flexible framework of legislation, giving the Member States the option of waiving the principle of non-discrimination whenever temporary workers have a permanent contract.

Lastly, in the field of public health and research in the area of sustainable development and development cooperation, the Commission for the first time applied Article 169 of the EC Treaty. The Commission adopted a proposal for a Decision of the European Parliament and of the Council to support a **long-term partnership between Europe and the developing countries to combat HIV/AIDS, malaria and tuberculosis**<sup>31</sup>. The aim of this initiative, which is original with regard to the principles of subsidiarity and proportionality, is to enable the Community to act alongside and complementary to the Member States in research programmes which some of them are implementing. The Commission therefore considered that it was not necessary for the Community to develop its own measures to replace Member States' actions, but that it would be more effective and more in keeping with Article 5 of the EC Treaty if it were to support their actions.

#### d) **Areas outside the political priorities**

The Commission has adopted a legislative proposal to guarantee the fundamental freedoms of the internal market. Thus, although the Member States are responsible for the national rules governing professional qualifications (in accordance with Article 47(2) of the EC Treaty the Community plays only a coordinating role), the Commission considers that they must be harmonised so that they no longer obstruct the freedom of movement for workers, freedom of establishment and the freedom to provide services<sup>32</sup>. The proposal for a Directive of the European Parliament and of the

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<sup>30</sup> Article 9 of the Protocol.

<sup>31</sup> COM(2002)474 final, adopted on 28 August 2002.

<sup>32</sup> Articles 39, 43 and 49 of the EC Treaty.

Council on the **recognition of professional qualifications**<sup>33</sup> seeks to supplement and simplify existing legislation, enabling Community nationals to have their professional qualifications recognised in the other Member States for the purpose of exercising a regulated profession. This involves, amongst other things, better management of the rules and ensuring that the citizen is better informed, consolidating the sectoral legislation already adopted and making application of the principles of recognition of professional qualifications more reliable and flexible.

Taking another example, for its proposal for a recommendation on the **application of health and safety legislation to self-employed workers**<sup>34</sup>, the Commission had to take Article 308 of the EC Treaty as the basis for this proposal, since Article 137 relates only to employees. The choice of this legal basis involves justifying to an even greater extent the need for action at Community level in an area not specifically covered by the Treaty. This particular situation led the Commission's services to pay particular attention to the Explanatory Memorandum throughout the preparation of this initiative (cf. also the discussion within the Council – point 2.3).

### 2.3. Application of the principles in the Community process in 2002

The **Council and the European Parliament are also equally bound by the principles of subsidiarity and proportionality** in their role as co-legislators. Given the delays involved in the Community legislative process, most of the legislative proposals discussed by the European Parliament and the Council during 2002 date back to previous years, except for the proposal on temporary workers.

Such an examination is particularly important because, in addition to having to take into account Article 5 of the EC Treaty, **the Council and Parliament have specific obligations** laid down in the Protocol and the interinstitutional agreement: *"the European Parliament and the Council shall, as an integral part of the overall examination of Commission proposals, consider their consistency with Article 5 of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal"*<sup>35</sup> and *"any amendments to the Commission's text, whether made by the European Parliament or the Council, which modify the scope for Community action, must be accompanied by justification with regard to the principle of subsidiarity and Article 5"*<sup>36</sup>.

This is the first time that the Commission has examined application of the principles of subsidiarity and proportionality by the Parliament and the Council in this report. In this first year, the report will concentrate on the most representative cases of the year 2002, in that they demonstrate very clearly that **application of the principles of subsidiarity and proportionality is part of an ongoing appraisal carried on throughout the legislative process**, in the context of the dialogue within and between the three Institutions. In this respect, the report identifies several important stages: examination and amendment of the legislative proposal by the Council, then by the

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<sup>33</sup> COM(2002)119 final, adopted on 7 March 2002.

<sup>34</sup> COM(2002)149 final, adopted on 3 April 2002.

<sup>35</sup> Article 11 of the Protocol.

<sup>36</sup> Interinstitutional Agreement between the European Parliament, the Council and the Commission of 29 October 1993; Bull. 3/EC 10-1993, p. 129.

European Parliament, examination of the European Parliament's amendments by the Commission, then, finally, under the codecision procedure, the possible conciliation procedure stage.

a) **Examination and application of the principles by the Council**

As the representative of the Member States and guarantor of their powers, the Council takes particular care to ensure respect of the principles of subsidiarity and proportionality in the Commission's legislative proposals. The discussions within the Council are evidence of this. Now and then they illustrate the **diversity of appraisal of these principles between the national delegations and between the delegations and the Commission**. Far from hampering the decision-making process, these discussions on the contrary more often than not help to establish a satisfactory balance with regard to these principles, respecting the prerogatives of each of the institutions.

Thus, the proposal for a Directive of the European Parliament and of the Council relating to the **compulsory use of safety belts**<sup>37</sup> was discussed several times within the Council during the first half of 2002. During the discussions, some said that the Directive was too prescriptive and did not respect the principle of subsidiarity and that legislation on the subject should remain within the competence of the Member States, and that the Community should restrict itself to adopting framework legislation laying down general principles. This position on road safety, which was reaffirmed on several occasions, was always challenged by the Commission. The Council finally accepted the Commission's approach, recognising, as the Commission claimed, that road safety had an indisputable transnational impact, given the very high mobility in this sector, and that, furthermore, in order to guarantee a uniform level of protection, Community action was more relevant than action by the Member States. This important, legitimate discussion within the Council did not prevent a unanimous political agreement from being reached on this subject<sup>38</sup> with a view to formal adoption of the directive.

Another example under discussion: last April the Commission adopted a proposal for a recommendation on the **application of health and safety legislation to self-employed workers**<sup>39</sup> on the basis of Article 308 of the Treaty, (cf. supra point 2.2). The Council challenged the use of Article 308, launching a discussion on the application of the principle of subsidiarity. Two conditions are in fact necessary for the use of this Article. Firstly, since the case involves a power which is not explicitly incorporated into the Treaty, the decision can be taken only if there is a **need for Community action in this area**; and, secondly, **it is up to the Council finally to determine the need for such action**. As several delegations have drawn attention to a problem of political judgment which leads them to consider that this Community initiative is not justified, the dossier is still being discussed by the Council.

Finally, the Commission and the Council were confronted with an important political debate on an ethical problem which is at the centre of subsidiarity and proportionality

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<sup>37</sup> COM(2000)815 final – Proposal for a directive amending Council Directive 91/671/EEC on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3.5 tonnes.

<sup>38</sup> Conclusions of the Transport/Telecommunications Council of 17 June 2002.

<sup>39</sup> COM(2002)149 final, adopted on 3 April 2002.

issues. On 30 September the Competitiveness Council adopted the specific programmes of the 6th Framework Programme for Research and Development. In order to facilitate its adoption, the Commission presented points of compromise with the Council Presidency **covering the sensitive issues of the use of human embryos and stem cells**. These state in particular that the ethical acceptability of certain fields of research falls within the context of diversity between Member States and remains governed by national laws under the principle of subsidiarity<sup>40</sup>.

**b) Examination and application of the principles by the European Parliament**

While the European Parliament also closely examines whether or not the principles of subsidiarity and proportionality are respected in the Commission's proposals, its approach differs from that of the Council and is geared more towards preserving the Community's powers. Furthermore, once it has adopted its amendments, the Commission must give an opinion on them. Here too, interinstitutional dialogue makes it possible to find a balanced solution in most cases, which respects the prerogatives of each of the institutions.

During these discussions, the Commission pays particular attention to amendments modifying the scope or choice of instrument which might therefore affect the sound application of the principles of subsidiarity and proportionality. Thus, on 5 February 2002, when examining under the consultation procedure the **proposal for a Council Directive** relating to the conditions in which **third-country nationals shall have the freedom to travel in the territory of the Member States** for periods not exceeding three months<sup>41</sup>, the European Parliament adopted a provision aimed at **changing the proposal for a Directive into a proposal for a Regulation**<sup>42</sup>. Parliament considered that, for reasons relating to the principle of subsidiarity, this legislation must be applied effectively throughout the Community in a uniform manner, and that any specific provisions left to Member States would risk distorting its proper implementation. The Commission accepted the relevance of this argument in plenary session, and undertook to defend it before the Council, without, however, amending its proposal at this stage. The Council will resume discussion of this matter shortly.

Another important example concerns the **protection of pedestrians**. The Commission had obtained clear commitments from European automobile manufacturers that they would modify vehicle bodywork and brake systems in order to make collisions with pedestrians less dangerous. Judging these commitments sufficient to ensure better protection for pedestrians, it felt that a legislative proposal was unnecessary, and adopted a communication to the Council and the European Parliament incorporating this approach in July 2001<sup>43</sup>. On 13 June 2002, the **European Parliament considered, firstly, that action at Community level was in fact necessary in this field and, secondly, that with regard to the protection of citizens, the Community could not abandon its legislative powers to third parties**. Parliament concluded by

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<sup>40</sup> Conclusions of the Competitiveness Council of 30 September 2002.

<sup>41</sup> COM(2001)388 final, adopted on 10 July 2001.

<sup>42</sup> Amendment No 1.

<sup>43</sup> COM(2001)389 final, adopted on 11 July 2001.

considering that a legislative framework was necessary<sup>44</sup>. The Commission, recognising the merits of this argument, should shortly adopt a legislative proposal.

Under the Community legislative process, the Commission must express its opinion on the amendments adopted by the European Parliament. On the whole, few amendments lead to further discussion of the principles of subsidiarity and proportionality, compared with the large number of amendments adopted by Parliament. The Commission examines very carefully those which might result in new powers for the Community or which seek to limit Member States' powers in implementing the legal instruments, but also those aimed at making the proposal very detailed, sometimes excessively so, and therefore not respecting the principle of proportionality.

Examples of this for the year 2002 are certain amendments<sup>45</sup> adopted during the April plenary session on the proposal for a Directive on the **protection of workers exposed to asbestos**, which were rejected by the Commission, by the Committee on Employment and Social Affairs and by the European Parliament itself in a plenary session. The fact was that these amendments sought to restrict Member States' choice regarding implementation of the objectives of the Directive.

### c) **The dialogue between the three Institutions**

There were difficulties this year in applying the proposal for a **Regulation on the hygiene of foodstuffs**<sup>46</sup> to the local sale of products and in particular to markets. The European Parliament wishes to exclude totally from the scope of the Regulation the direct local sale of small quantities, while the Council wants the Regulation to state that Member States would have the possibility of adopting alternative rules for this sector. The Commission, however, considers that it is up to the Member States specifically to legislate on this subject, since such sales are not transnational in nature or in their impact. The discussion is set to continue.

Another important example in 2002 is the proposal for a **Directive on public access to environmental information**, which has been under discussion for two years<sup>47</sup>. After the second reading, Parliament and the Council initiated a conciliation procedure in September in order to reach agreement, in particular on the scope of the Directive and its detail, thus bringing into play diverging interpretations of the principles of subsidiarity and proportionality. The aim of the Commission and the Council was to seek only to implement the **Aarhus Convention**<sup>48</sup>, while the Parliament, believing that Community action should extend beyond the Convention, wanted to extend the areas covered by the Directive. The Commission and the Council opposed some of the European Parliament's amendments, considering that they place excessively heavy obligations on national administrations. Discussions

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<sup>44</sup> Resolution of the European Parliament, adopted on 13 June 2002.

<sup>45</sup> Amendments Nos 30, 33, 35, 36 and 37.

<sup>46</sup> COM(2000)438 final adopted on 14 July 2000.

<sup>47</sup> COM(2000)402 final adopted on 29 June 2000.

<sup>48</sup> COM(1998)344 final: proposal for a Council Decision on the signature by the European Community of the UN/ECE Convention on access to information, public participation and access to justice in environmental matters (signed on 17 June 1998).

within the conciliation committee made it possible to reach agreement on these various points, while respecting the principles of subsidiarity and proportionality.

## 2.4. Conclusions

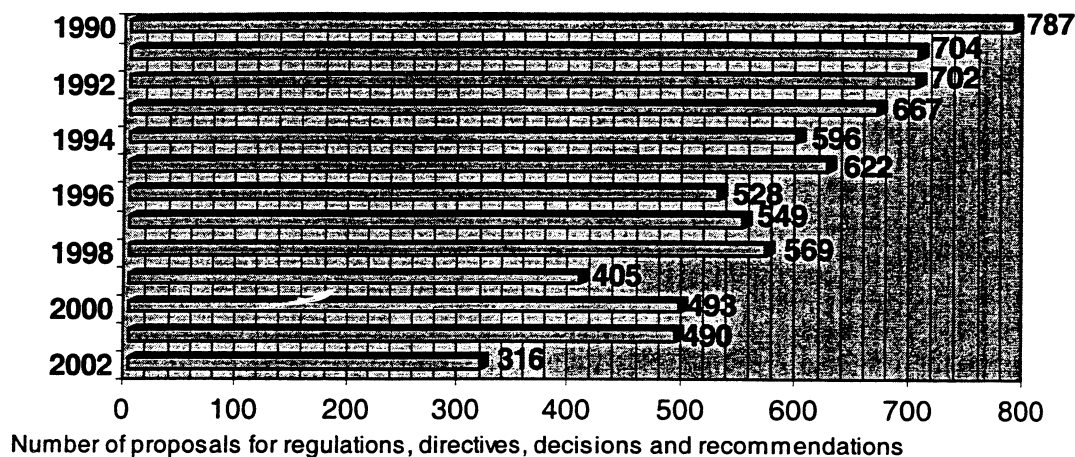
The examples quoted in the report for the year 2002 demonstrate that evaluation and application of the principles of subsidiarity and proportionality remain dynamic concepts in a clear legislative framework. In this respect, dialogue between the Institutions within the legislative process is, as can be clearly seen, indispensable in order to find a satisfactory balance from both a legal and political point of view, as well as from the point of view of the Member States and the Community. The Commission wishes to see such vigilance towards these principles maintained constantly throughout the legislative process, including when the European Parliament and the Council reach an agreement during the conciliation stage.

## 3. BETTER QUALITY, SIMPLIFIED LEGISLATION

Since 1995, the Commission has included in the annual report a section on legislation itself, mainly in terms of quality and statistical information. This has made it possible for data to be collected over several years and for this first assessment of the period to be made this year.

### 3.1. Legislative activity in 2002

**Number of Commission proposals 1990-2002**  
 \*situation at 27/11/2002 source: PreLex database  
 (From 1990/2001 Eur-Lex database)



Calculation of the number of legislative proposals per year began in 1990. In 2002<sup>49</sup>, examination of the Commission's legislative activity shows that the annual number of proposals has continued to decrease, reaching a new lower level. 316 legislative proposals have thus been drawn up this year, at the date of compilation of the report, as opposed to 787 in 1990. This trend, which has been observed since the completion of the internal market, must not, however, create a misleading impression of

<sup>49</sup> The figures for 2002 stop at 27 November.



Community action or of the dynamic role played by the Commission in the Community process. The trend shows that the Community has reached a stage of maturity with regard to the objectives of the Treaty and the existing *acquis*.

### 3.2. Better preparation of legislative proposals

The virtually exclusive exercise of the right of initiative gives the Commission the special responsibility of ensuring the quality of its legislative proposals. It has several instruments with which to do this (consultations, forums, impact analyses, explanatory memoranda, etc.), some of which are included in the Protocol on the application of the principles of subsidiarity and proportionality. The Commission has been applying these quality practices for several years and has recently taken measures to improve them through the White Paper on European Governance and the Action Plan to simplify and improve the regulatory environment.

#### a) Consultations

This year also the Commission did a great deal of consulting, listening and examining of opinions and experts' reports from civil society (in particular operators, associations and NGOs). This is a vital instrument with which to define the need for an action, the general and specific expectations and the types of action to be taken.

In 2002<sup>50</sup>, the Commission produced **2 Green Papers<sup>51</sup> and 95 communications of a consultative nature**. It also published **76 reports**. It is evident that the need for consultation is particularly great in areas in which the Community has new or shared responsibilities (including justice and internal affairs, energy or consumer protection); but also in sectoral policies in which the Community has a great deal of responsibility, such as transport and the internal market.

The social dialogue also plays a major role in upstream monitoring of compliance with the principles of subsidiarity and proportionality as a source of law (Article 138 and, in particular, Article 139 of the EC Treaty). In this context, the obligation stemming from the EC Treaty (Article 138) for the Commission to consult the social partners before submitting proposals in the area of social policy on one hand makes it possible to legislate only where other measures have proved ineffective, and on the other to properly tailor the proposals submitted to take due account of the opinions expressed by the parties most closely concerned. Moreover, Article 139 also makes it possible, by an act of the Council, to implement European level collective agreements.

Reviewing the situation over **the past ten years**, it is possible to calculate the large volume of consultations undertaken by the Commission: **38 Green Papers, 19 White Papers and over 1200 communications in all sectors combined**. It also published nearly **1500 reports** on Community actions. Once again it was the sectors in which there has been constant legislative activity – transport, energy and the internal market – which required the largest number of consultations over this period.

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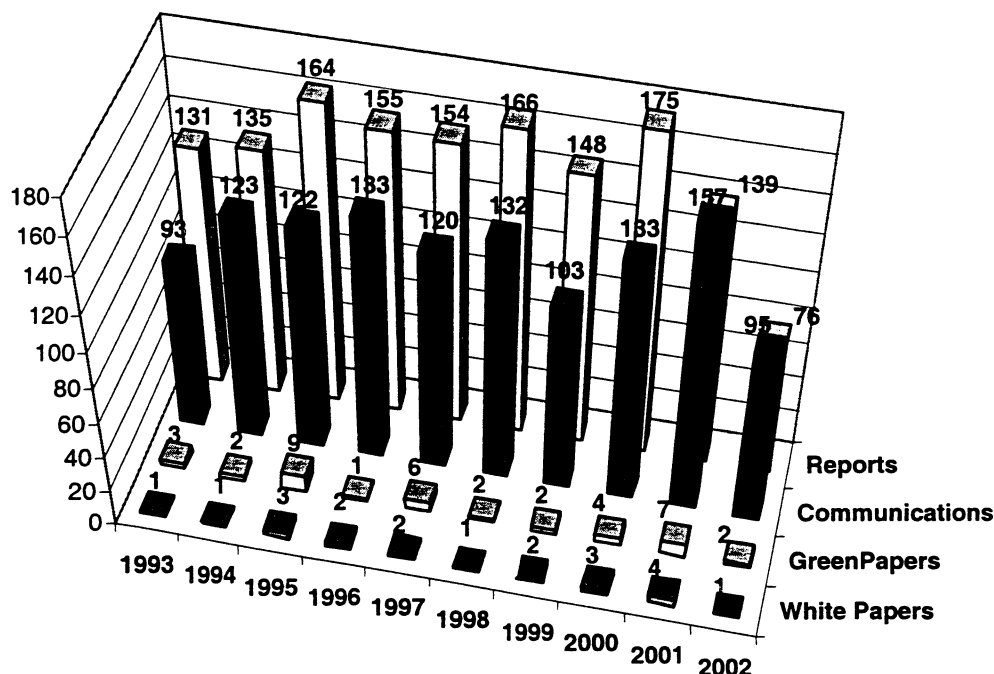
*Idem*

<sup>51</sup>

COM(2002)196 final – Green Paper on alternative dispute resolution in civil and commercial law and COM(2002)175 final – Green Paper on a Community return policy on illegal residents. Two other Green Papers should be adopted before the end of the year.

Finally, when a new team of Commissioners enters into office, bringing with it new initiatives, there is typically an increase in the number of consultations, and in particular Green Papers (9 in 1995 and 11 in 2000-2001).

**Consultation documents and reports 1993-2002**  
*Situation at 18/10/2002 - source: Eur-lex database*



In accordance with the commitments made in the White Paper on European Governance, the Commission has decided to improve recourse to consultation by defining **minimum standards, in association with civil society**. In June 2002 it thus adopted a consultative document proposing standards and should make public the final standards before the end of the year in a new communication.<sup>52</sup> The main elements will be the definition of a minimum consultation period and the establishment of a single access point.

Over the years there has also been an increase in the methods of consultation used; these are now often less formal than Green Papers or communications and more flexible and user-friendly. It is in this respect interesting to note the **increasingly frequent organisation of forums or specific conferences or consultations on the Internet**. Examples for 2002 are the European Energy and Transport Forum, created this year, and the introduction of Interactive Policy Making (IPM)<sup>53</sup>, which has already made possible 12 on-line consultations, including one on data protection which received 10 000 replies in eleven weeks.

<sup>52</sup> COM(2002)276 final adopted on 5 June 2002.

<sup>53</sup> Available via <http://www.ipmmarkt.homestead.com>

## b) **Impact assessments**

Pursuant to the Protocol on the application of the principles of subsidiarity and proportionality, the Commission carries out impact assessments of these measures to justify its proposals on the basis of qualitative and quantitative indicators, and also indicates the cost of its proposals to the Community budget.

As stated above (cf. part 2.2.), the Commission has carried out several important assessments this year, in particular for the proposal for a mid-term review of the Common Agricultural Policy. It also uses this instrument alongside formal consultations in order to better assess the need and relevance of action at Community level, in accordance with the principles of subsidiarity. It has thus launched assessments concerning **consumer credit** and **combating piracy and counterfeiting** with a view to making possible legislative proposals.

Being convinced that further development of such an instrument is necessary to improve the quality of legislation, the **Commission has defined a single method of impact assessment**, assessing not only the economic impact, but also the social and environmental impact of its main policy and legislative proposals<sup>54</sup>. The Commission is of the opinion that this instrument, which will be introduced gradually by the Commission's services from 2003, will provide it, the European Parliament and the Council, with a solid, objective basis for legislative discussions.

## c) **Other initiatives taken in 2002**

With regard to proposals made this year, the Commission is also placing more importance on **the explanatory memorandum** of these proposals in order to take into account their preparation more effectively (consultations and assessments carried out) and to improve justification of conformity with the principles of subsidiarity and proportionality. As laid down in the Action Plan to simplify and improve the regulatory environment, the Commission will draw up internally a standard explanatory memorandum as a guide for its services.

In the same vein, the Commission is setting up **an internal network on "Better lawmaking"**, responsible for ensuring the quality of legislative proposals and implementing new initiatives in this area, in coordination with the existing network which deals with strategic planning and activity-based management. The "Better lawmaking" network will also have to identify at the earliest stage possible questions which might be raised with regard to the principles of subsidiarity and proportionality during preparation of the proposals.

The Commission has made several other proposals to the European Parliament and the Council in order to improve the quality of legislation. These include the establishment of an interinstitutional network to deal specifically with such issues, but also the more frequent use of more flexible legislative or non-legislative instruments, such as framework directives (in accordance with the Protocol), co-regulation and self-regulation. The Seville European Council, meeting last June, endorsed the approach proposed by the Commission and called upon the three Institutions to

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<sup>54</sup> COM(2002)277 final adopted on 5 June 2002.

conclude an **interinstitutional agreement** on the subject before the end of 2002. Discussions are currently in progress.

Mention can also be made of the introduction in 2002 of practices decided in the context of the White Paper on internal administrative reform, particularly action 94 concerning better 'fraud-proofing' of contract legislation and management. This action has given rise to the adoption of a Commission communication<sup>55</sup> which provides *inter alia* for specific consultation of the European anti-fraud office (OLAF), prior to inter-service consultation, on legislative projects concerning sensitive sectors. This procedure will take effect as from the preparatory cycle for the Commission's legislative work programme for 2003, which was adopted on 30 October 2002<sup>56</sup>

### 3.3. Improving the quality of legislation adopted

The year 2002 is particularly important from this point of view because it marks simultaneously the impending completion of the *acquis* consolidation exercise, but also the start of implementation of the codification programme and of the interinstitutional agreement on recasting, and finally the preparation of the future *acquis* simplification programme.

#### a) Consolidation

The Community's Official Publications Office, in association with the Commission's Legal Service, is carrying out this consolidation effort<sup>57</sup> which provides material for codification and recasting. Consolidation of all existing legislation must be completed in July 2003. There was therefore naturally a greater volume of this work in the year 2002, giving an overall result since 1999 of some **1600 families of consolidated acts**, (315 in 1999, 831 in 2000 and 1097 in 2001).

#### b) Codification

Codification<sup>58</sup> has already proved how useful it is because **from 1994 onwards**, with the adoption of an interinstitutional agreement on official codification<sup>59</sup>, 33 new legal acts have been adopted, thus making it possible to **repeal 347 pre-existing acts**.

In order to extend this practice the Commission adopted a specific codification programme<sup>60</sup> in November 2001. The Commission's services have now identified the acts which should be codified. For example, the Directives concerning certain aspects of the organisation of working time (which will be replaced by two acts).

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<sup>55</sup> SEC(2001) 2029 final.

<sup>56</sup> COM(2002) 590 final.

<sup>57</sup> Consolidation means grouping together in a single informal text the current provisions of a given regulatory instrument which are spread among the first legal act and subsequent amending acts.

<sup>58</sup> Codification means the adoption of a new legal instrument which brings together, in a single text, but without changing the substance, a previous instrument and its successive amendments, with the new instrument replacing the old one and repealing it.

<sup>59</sup> Interinstitutional agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts; OJEC C 102, 04.04.1996, pp. 2-3.

<sup>60</sup> COM(2001)645 final adopted on 21 November 2001.

The Council and the European Parliament have also speeded up their work and have **adopted 5 proposals for codification**<sup>61</sup>, which will replace **59 pre-existing acts**.

### c) **Recasting**

The European Parliament, the Council and the Commission, all aware of the benefits of recasting<sup>62</sup>, concluded an **interinstitutional agreement** in November 2001<sup>63</sup>, **which entered into force in March 2002**. On the basis of this agreement, the Commission's services are currently preparing several proposals for recasting. At this stage the Commission has been able to adopt only one proposal on the coordination of the provisions relating to access to the activity of insurance other than life insurance (which will replace 7 pre-existing acts)<sup>64</sup>.

The European Parliament and the Council also adopted a pending proposal for recasting on undesirable substances in animal feed<sup>65</sup>.

### d) **Simplification**

The Commission continued its sectoral efforts in this field, in particular through implementation of the SLIM<sup>66</sup> initiative, which has just come to the end of its fifth phase. Since the initiative was launched in 1996, 17 legislative sectors have been concerned by simplification, specifically targeting public procurement, life insurance, vocational qualifications and company law.

The Commission is also taking great care to define the *acquis communautaire* simplification programme provided for in the Action Plan to simplify and improve the *acquis communautaire*. The three Institutions must reach an agreement on the working procedures for this programme. At this stage, the Commission is identifying areas of the *acquis* in which simplification would be desirable. It will publish a communication on this subject at the beginning of next year.

## 3.4. **Accessibility**

Better lawmaking also means allowing better access to Community legislation. This year, as well as improving its existing tools, e.g. the PreLex<sup>67</sup> database on inter-institutional procedures or the regular sample and other surveys conducted by the Commission among the people of Europe, the Commission has developed new initiatives using several types of media in various fields. Sector-specific examples are

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<sup>61</sup> Directives 2002/53/EC; 2002/54/EC; 2002/55/EC; 2002/56/EC and 2002/57/EC adopted on 13 June; OJEC L 193, 20.07.02.

<sup>62</sup> Recasting makes it possible to adopt a single legislative instrument which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act.

<sup>63</sup> Interinstitutional agreement on a more structured use of the recasting technique for legal acts; OJEC C 077, 28.03.02, pp. 1-3.

<sup>64</sup> Directive 73/239/EC.

<sup>65</sup> Directive 2002/32/EC; OJEC L, 30.05.02. p. 10.

<sup>66</sup> Simpler Legislation for the Internal Market.

<sup>67</sup> Available via: <http://europa.eu.int/prelex/apcnet.cfm>

the production of brochures on competition policy<sup>68</sup>, the publication of the **consumer policy strategy for 2002-2006**<sup>69</sup> and the opening of the **European culture portal**<sup>70</sup>, the first thematic portal of this kind, giving direct access to Community legislation, but also to measures and financing in this area, which is part of the Commission's strategy to develop several thematic portals.

With regard to the placing of information online, without going into excessive detail, it is worth pointing out that the Commission decided to place online the minutes of its meetings as from 1 January. That date also marked the beginning of free online access to documents available on Eur-Lex. Finally, last September the Commission placed online all the *acquis communautaire* in the field of justice and internal affairs, which is a new Community responsibility directly concerning citizens<sup>71</sup>. The Commission had already done this in other fields.

Likewise, the Commission has decided to publish in the Official Journal decisions on Single Programming Documents and Community Support Frameworks taken by the Commission, since they concern the lives of citizens at local level.

The Commission has introduced a new planning system in order to reliably plan the initiatives which it intends to adopt during the next three months. The three-month programme is updated each month and sent to each of the Union's Institutions to enable them to organise their own activities. For the sake of transparency it is now accessible to the public via the server Europa.

Finally, last July the Commission set up the **SOLVIT network** to solve the problems of citizens and businesses which run into difficulties when Community law is incorrectly applied. This groups together specific centres in each Member State.

### 3.5. Drafting quality

The Commission has this year continued the implementation of the 1998 inter-institutional agreement on drafting quality in accordance with Declaration 39 on the drafting quality of Community legislation, attached to the Amsterdam Treaty.

The inter-institutional practical guide for services has been overhauled and is shortly to be widely published and placed online. The training of reviser-linguists, who play an essential role in ensuring the quality of legislation, has been stepped up this year, and particular emphasis has been placed on the practical guide and the specific features of this work (multi-lingualism, working rules, etc). In addition, the LegisWrite informatics tool, which allows common presentation throughout the institutions, has been further developed, particularly with a view to codification and recasting.

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<sup>68</sup> "The competition rules for supply and distribution agreements" and "Glossary of terms used in EU competition policy" are available via:

[http://europa.eu.int/comm/competition/publications/rules\\_en.pdf](http://europa.eu.int/comm/competition/publications/rules_en.pdf)

<sup>69</sup> Available via [http://europa.eu.int/comm/dgs/health\\_consumer/library/pub/pub09\\_en.pdf](http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub09_en.pdf)

<sup>70</sup> Available via <http://europa.eu.int/comm/culture>

<sup>71</sup> Available via [http://europa.eu.int/comm/justice\\_home/index\\_fr.htm](http://europa.eu.int/comm/justice_home/index_fr.htm)

Lastly, a first seminar has been organised on the problems of ensuring drafting quality between the Commission and the Member States.

#### 4. CONCLUSIONS

The year 2002 is the tenth year of application by the European Parliament, the Council and the Commission of the principles of subsidiarity and proportionality, as laid down in the Treaty of Maastricht. The first assessment which can be made of this period, which was confirmed yet again in 2002, is favourable. The Institutions have on the whole satisfactorily observed Article 5 of the EC Treaty and the annexed Protocol. This positive assessment by the Commission is moreover shared by the European Council in its conclusions and by the European Parliament in its biannual report, and by the low number of appeals to the Court of Justice on grounds of subsidiarity or proportionality.

Furthermore, the Convention on the Future of the Union acknowledged that there were very few cases in which the Institutions failed to respect the principle of subsidiarity. Nevertheless, with a view to involving national Parliaments in monitoring Community legislation, one of the Convention's working groups has proposed to establish an early warning mechanism for Commission proposals and provision for referral to the Court of Justice, particularly by national Parliaments and the Committee of the Regions.

With regard to the quality of legislation either in the process of adoption or already adopted, the Commission has this year taken numerous initiatives which it intends to implement in order to consolidate the work which has been achieved over several years. It hopes to have the political support and substantial involvement of the European Parliament and the Council in this area.

